No. 82-1345

In the Supreme Court of the United States

OCTOBER TERM, 1982

ALABAMA POWER COMPANY, et al,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF AMICUS CURIAE OF THE STATE OF OREGON IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

DAVE FROHNMAYER
Attorney General of Oregon
STANTON F. LONG
Deputy Attorney General
WILLIAM F. GARY
Solicitor General
JAMES E. MOUNTAIN, JR.
Deputy Solicitor General
W. BENNY WON
Assistant Attorney General
100 Justice Building
Salem, Oregon 97310
Telephone: (503) 378-4402
Counsel for Amici

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STATEMENT OF THE CASE

This case presents the issue of the proper interpretation of Section 7(a) of the Federal Power Act, 16 USC § 800(a), which gives a preference to states and municipalities in the licensing of hydroelectric power projects. The petitioners contend that this preference does not apply in a relicensing proceeding against the "original licensee" applying for a license renewal.

The Federal Energy Regulatory Commission (FERC) held, in a declaratory ruling, that

> "the preference of Section 7(a) of the [Federal Power Act] favoring States and municipalities over citizens and corporations is applicable to all relicensing applications in which States or municipalities, and citizens or corporations, request successor licenses for the same water resources. . . ." *City of Bountiful, Utah* (Opinion No. 88), No. EL 78-43, p 10 (June 27, 1980).

The petitioners appealed, and the United States Circuit Court of Appeals for the Eleventh Circuit affirmed the FERC's order. *Alabama Power Co. v. FERC*, 685 F2d 1311 (1982).

The State of Oregon files this *amicus curiae* brief in support of the petitions for a writ of certiorari submitted by the petitioners in this case.

INTEREST OF AMICUS CURIAE, THE STATE OF OREGON

Oregon appears in this case to represent and to protect the economic interests of its residents, businesses and industries. Oregonians depend upon an adequate and affordable supply of electricity to operate their homes, stores and factories. The energy needs of a majority of Oregonians currently are served by privately owned energy suppliers which are subject to comprehensive state regulation. The ability of those utilities to renew current hydroelectric power project licenses will be adversely affected by the Court of Appeals' decision in this matter. The continued availability of inexpensive hydroelectric power to Oregon's energy suppliers is a

matter of vital importance to the state in its effort to assure an adequate supply of low-cost electricity for its people.

SUMMARY OF ARGUMENT

Oregon urges this Court to review the decision below because of its important legal and practical consequences. The Court of Appeals' interpretation of the public utility preference of Section 7(a) of the Federal Power Act, 16 USC § 800(a), should be reviewed and rejected as legally incorrect. The Court of Appeals' decision fails to give effect to the plain and unambiguous language of the statute. Moreover, the practical economic effects of the lower court's decision are immense and adverse. It gives public utilities a significant advantage in competitive proceedings for the relicensing of existing hydroelectric plants owned by investor-owned utilities. As a practical matter, it allows public utilities to acquire investor-owned plants by paying to the "original licensee" only the net cost of the plants plus severance damages; an amount considerably less than the cost of constructing replacement power plants today.

The statutory interpretation embraced by FERC and the Court of Appeals unfairly would redistribute the benefits of our nation's hydropower resources to publicly owned utilities and their customers at considerable loss and expense to those electricity

consumers who are served by investor-owned utilities. Allowing publicly owned utilities to acquire the hydroelectric plants of state-regulated, investor-owned utilities would have substantial adverse economic effects in Oregon. Congress clearly did not intend to sanction or to require such a shift of economic burdens to customers of investor-owned utilities.

ARGUMENT

Reasons for Granting the Writ

I. This case presents an important question of federal law.

The Court of Appeals' interpretation of the public utility preference will have significant effects on the future distribution of the benefits of low-cost hydroelectric power resources between the segments of the populace served by investor-owned utilities and those served by publicly owned utilities. The proper interpretation of the preference is of vital importance to the people and businesses of the State of Oregon, 80 percent of whom are served by investor-owned utilities.

The state's two largest investor-owned electric utilities, petitioner Pacific Power and Light Company (PP&L) and intervenor Portland General Electric Company (PGE), derive a significant portion of their power (16-17 percent) from their hydroelectric projects. These projects produce relatively

inexpensive electricity compared to coal-fired, gas-fired and oil-fired thermal plants, and nuclear plants.

The hydroelectric projects licensed to investor-owned utilities were paid for in large part by inclusion of depreciation charges and return of original investments in calculating customer rates. Thus, the large majority of Oregonians who are served by investor-owned utilities have a substantial interest in seeing PP&L and PGE retain these plants as part of their power supply systems so that the ratepayers will continue to share the benefits of the cheaper power derived from the plants. Oregon law provides that the rates charged by investor-owned electric utilities must be based upon the actual cost of the power sold. This provision ensures that the benefits of low-cost hydroelectric power are passed on to the utilities' customers.

The Court of Appeals' interpretation of the public utility preference, and the resulting redistribution of hydropower benefits from the customers served by investor-owned utilities to those served by publicly owned utilities, would have the following substantial adverse economic impacts on the former group of electricity consumers:

1. Loss of hydroelectric plants by the investor-owned utilities would necessitate the construction of replacement power plants at current high construc-

tion costs, resulting in significantly higher electricity rates.

2. The takeover of investor-owned utilities' hydroelectric plants by publicly owned utilities would discourage businesses and industries from locating, or staying, in the State of Oregon, 80 percent of which is served by investor-owned utilities. In the Pacific Northwest, most publicly owned utilities are "preference customers" of the Bonneville Power Administration (BPA). As such, they enjoy access to large amounts of low-cost federal hydroelectric power. *See* Bonneville Project Act, 16 USC § 832a *et seq.* In contrast, the commercial and industrial electricity rates of investor-owned utilities in Oregon presently are 48 to 142 percent higher than those charged by BPA preference customers in nearby service territories. The transfer of hydroelectric plants to publicly owned utilities would concentrate, rather than spread, hydropower benefits, contrary to the stated purposes of the Federal Power Act. *See* 16 USC § 824a(a); *NAACP v. Federal Power Commission*, 425 US 662, 669-670 n 5, 96 S Ct 1806, 48 L Ed2d 284 (1976). Transfer of power plants currently licensed to investor-owned utilities to public utilities would exacerbate the already large rate disparities between investor-owned and publicly owned utilities and thereby would place Oregon at an even greater disadvantage in attracting and

retaining businesses and industries as compared to neighboring states served by publicly owned utilities. There has been virtually no growth in PP&L's electric sales to industrial customers in Oregon in the last ten years.

Questions concerning the scope of the public utility preference of Section 7(a) of the Federal Power Act, 16 USC § 800(a), were presented to this Court in *Washington Public Power Supply System v. Federal Power Commission*, 387 US 428, 87 S Ct 1712, 18 L Ed2d 869 (1967). However, because this Court reversed the Court of Appeals' judgment and directed that the case be remanded to the FERC for further proceedings, it did not reach the questions. 387 US at 451. This case presents another opportunity to consider and address important questions of federal law relating to the scope of the public utility preference.

II. The Court of Appeals erred in not giving effect to the plain and unambiguous language of the statute.

Section 7(a) of the Federal Power Act provides:

> "(a) In issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and *in issuing licenses to new licensees under section 15 of this title the Commission shall give preference to applications therefor by States and municipalities*, provided, the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well

adapted, to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans." (Emphasis added.) 16 USC § 800(a).

The legal question presented in this case is whether an investor-owned utility "original licensee," who is an applicant in a hydroelectric project relicensing proceeding, is a "new licensee," within the meaning of Section 7(a), for purposes of the public utility preference provided therein.

Section 15 of the Federal Power Act provides, in pertinent part:

"(a) If the United States does not, at the expiration of the original license, exercise its right to take over, maintain, and operate any project or projects of the licensee, as provided in section 14 of this title, the commission is authorized to issue a new license to the *original licensee* upon such terms and conditions as may be authorized or required under the then existing laws and regulations, *or* to issue a new license under said terms and conditions to a *new licensee*, which license may cover any project or projects covered by the original license, and shall be issued on the condition that the new licensee shall, before taking possession of such project or projects, pay such amount, and assume such contracts as the United States is required to do in the manner specified in section 14 of this title: Provided, that in the event the United States does not exercise the right to take over or does not issue a license to a new licensee, or issue a new license to the

> original licensee, upon reasonable terms, then the commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the original license until the property is taken over or a new license is issued as aforesaid." (Emphasis added.) 16 USC § 808(a).

Section 15(a) clearly distinguishes between issuing a new license to the "original licensee" and issuing a new license to a "new licensee." The latter term, as used in Sections 15(a) and 7(a), plainly does not include the "original licensee." Thus, the Court of Appeals erred in not giving effect to the plain and unambiguous language of the statute. *Tennessee Valley Authority v. Hill*, 437 US 153, 184 n 29, 98 S Ct 2279, 57 L Ed2d 117 (1978).

CONCLUSION

The Court should review this case because of the substantial interest of electricity consumers in Oregon and the rest of the country in the future distribution of the benefits of our nation's low-cost hydroelectric power. The Court of Appeals' interpretation of the public utility preference of Section 7(a) of the Federal Power Act, 16 USC § 800(a), is wrong and should not be permitted to stand. The lower court failed to give effect to the plain and unambiguous language of the statute. Its strained construction of the Act gives public utilities a significant advantage in competitive proceedings for the relicensing of existing hydroelectric plants owned by

investor-owned utilities. The lower court's holding would permit public utilities to acquire investor-owned utility plants at bargain prices, at the expense of the ratepayers of the current licensees. Congress cannot have intended such an inequitable result. The petitions for writ of certiorari should be granted and the Court should address the simple, yet enormously significant issue of statutory construction which this case presents.

Respectfully submitted,

DAVE FROHNMAYER
Attorney General of Oregon
STANTON F. LONG
Deputy Attorney General
WILLIAM F. GARY
Solicitor General
JAMES E. MOUNTAIN, JR.
Deputy Solicitor General
W. BENNY WON
Assistant Attorney General
Counsel for Amici